

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E052 OF 2025**

BETWEEN

APOLLO MBOYAPETITIONER

VERSUS

THE PARLIAMENTARY SERVICE COMMISSION.....1ST

RESPONDENT

PROF. ADAMS OLOO.....2ND

RESPONDENT

HON. ATTORNEY GENERAL.....3RD

RESPONDENT

AND

KIOME LINDA GAKII.....1ST INTERESTED

PARTY

JAMES EVANS MISATI2ND INTERESTED

PARTY

NICODEMUS KIPCHUMBA BORE.....3RD INTERESTED

PARTY

KOKI MULI GRIGNON.....4TH INTERESTED

PARTY

CAROLINE KITUKU.....5TH INTERESTED

PARTY

TANUI ANDREW KIPKOECH.....6TH INTERESTED

PARTY

NELSON MAKANDA.....7TH INTERESTED

PARTY

FATUMA SAMAN.....8TH INTERESTED

PARTY

JUDGMENT

Petitioners' case

1. On 20th December 2024 the President appointed the 2nd respondent to the position of Strategy and Communications Advisor in the Office of the President, a position the 2nd respondent accepted.

2. The 2nd respondent was later appointed a member of the Independent Electoral and Boundaries Commission (IEBC) Selection Panel for the recruitment of nominees for appointment as Chairperson and members of the IEBC to represent minority coalition of political parties in Parliament.

3. The petitioner filed this petition challenging the 2nd respondent's appointment to the Selection Panel on several grounds and sought declarations and orders invalidating the appointment. The grounds included conflict of interest with the petitioner arguing that since the 2nd respondent held an office in the executive, the appointment to the selection panel was an affront to the principle of separation of powers and representation intended by the IEBC Act. The petitioner asserted that the 2nd respondent

could not faithfully, impartially and in good conscience be an independent member in the selection panel and at the same time an advisor to the President within the executive.

4. The petitioner asserted that such appointment was contrary to the values and principles in article 10, Chapter 6 of the Constitution and was void. According to the petitioner, elections come out of a process which begins with the appointment of IEBC Commissioners to the announcement and declaration of results and, therefore, the 2nd respondent's appointment to the selection panel would prejudice the electoral process.

5. The petitioner argued that the 2nd respondent did not resign from his advisory role prior to his

nomination but sought permission to step aside without taking a follow up action of formally stepping aside or resigning by serving a letter of resignation to the appointing authority. The petitioner asserted that the 2nd respondent was aware that holding the two positions would compromise the impartiality and integrity of the selection panel and was bound by the provisions in Chapter six of the Constitution.

6. The petitioner relied on the decision in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR for the position that elections being a process, IEBC commissioners appointed through a tainted process would put into question the outcome

of the elections conducted and managed by selected IEBC Commission.

7. The petitioner cited article 2(4) of the Constitution for the argument that anything done in contravention of the Constitution is null and void and urged that money earned in contravention of the Constitution should be refunded.

8. The petitioner again relied on the decision in *Belvin Wanjiru Namu v National Police Service Commission & another* [2019] eKLR for the contention that the 2nd respondent had competing interests as advisor and a member of the selection panel. According to the petitioner, the 2nd respondent's position in the selection panel presented conflict of interest because holding the two roles is inconsistent,

incompatible and prejudicial since the 2nd respondent is serving in the office of the President who is a potential candidate in 2027 and in the selection panel responsible in reconstituting the IEBC to manage that election.

9. The petitioner took the view, therefore, that the 2nd respondent's position in the selection panel presented a brazen conflict of interest and was an affront to the principle of separation of powers and representation that was intended in the IEBC Act. The 2nd respondent could not undertake both roles faithfully, impartially and in good conscience which is contrary to article 10 of the Constitution and suffered procedural infirmity and illegality. The petitioner relied on the decision in *Trusted Society of*

Human Alliance v Attorney General and 2 others
Nairobi Petition [2012] eKLR.

10. The petitioner urged the court to allow the petition and grant the prayers sought, including; a declaration that the 2nd respondent unlawfully and unconstitutionally held two offices concurrently as Presidential Advisor and member of the IEBC selection panel; a declaration that the 2nd respondent's appointment to the IEBC Selection Panel violates the principle of separation of powers and defeats the representative objects of the IEBC Act and a declaration that all decisions and/or resolutions of the IEBC selection panel made during the period when the 2nd respondent was a member of the panel are null and void.

1st respondent's case

11. Parliamentary Service Commission, the 1st respondent, opposed the petition through a replying affidavit. The 1st respondent stated that the 2nd respondent's nomination to the selection panel was made in compliance with the law (Paragraph 1(2) (a) of the First Schedule to the IEBC Act).

12. It was the 1st respondent's case that prior to nomination, the 2nd respondent was cleared by the relevant agencies, namely; The Ethics and Anti-Corruption Commission, the Higher Education Loans Board, the Directorate of Criminal Investigations, Kenya Revenue Authority and Credit Info Kenya Limited in compliance with Chapter Six of the Constitution and the Leadership and Integrity Act.

13. The 2nd respondent also met the requirements in the First Schedule to the IEBC Act and was nominated to the selection panel to represent the minority party or coalition of parties in Parliament, and was eventually appointed by the President ON 27th January 2025.

14. The 1st respondent denied the petitioner's allegation of conflict of interest on the part of the 2nd respondent, asserting that members of the selection panel subscribed to the oath of office to uphold the Constitution, the law and to serve independently, ensuring their impartiality in discharging their duties. The 2nd respondent was therefore bound to uphold the Constitution and the law in the discharge of his duties.

15. The 1st respondent argued that although the petitioner had highlighted various articles of the Constitution, he did not demonstrate how the 2nd petitioner's appointment violated those provisions. Reliance was placed on the decisions in *Anarita Karimi Njeru v Republic* (supra) and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] KECA 445 (KLR).

16. The 1st respondent went on to argue, that the 2nd respondent had resigned from his advisory role and therefore conflict of interest would not arise. The 1st respondent maintained that the petitioner did not adduce evidence showing that the 2nd respondent's alleged advisory role could influence the selection panel's operations or its decision-making process.

17. The 1st respondent reiterated the implication the orders sought would have to the country if granted and relied on the decisions in *Attorney General v Tolphin Nafula & Others* (Civil Application No. E121 of 2021) and *Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission & 2 others; Independent Electoral and Boundaries Commission* [2021] eKLR, and urged the court to dismiss the petition with costs.

2nd respondent's case

18. The 2nd respondent opposed the petition through a replying affidavit and supplementary affidavit. The 2nd respondent stated he was one of the applicants interviewed and was subsequently nominated by the 1st respondent as a member of the selection panel to

represent the minority coalition party in Parliament pursuant to section 1(2) (a) of the First Schedule to the IEBC Act.

19. On 25th October 2024 a Constitutional Petition No. E043 of 2024; Boniface Njogu v Attorney General & another was filed challenging the appointment of all members nominated to the selection panel and the court issued orders stopping their gazettelement and formal appointment pending determination of that petition.

20. The 2nd respondent asserted that during the pendency of the petition, the President appointed him Strategy and Communication advisor in the President's Council of Economic Advisors. On 24th January 2025, the Court dismissed the petition

paving the way for the formal appointment of members of the selection panel.

21. The 2nd respondent asserted that on the same day he tendered his resignation through letter dated 24th January 2025 stepping aside from his role as the President's Advisor which was accepted through letter dated 27th January 2025. On 27th January 2025, he was appointed a member of the Selection Panel. He denied holding two positions as at the time of his appointment to the selection panel. He was sworn in as a member of the selection panel on 3rd February 2025. The oath he took required him to be independent, impartial and unbiased in the performance of his duties. The allegation of conflict of interest, bias or undue influence is not true.

22. The 2nd respondent argued that the petition is founded on falsehoods since he had resigned from his advisory role before his appointment to the selection panel and there was no requirement that the resignation must be accepted by the appointing authority for it to take effect. The 2nd respondent relied on the decisions in *Edwin Beiti Kipchumba v National Bank of Kenya Limited* [2018] KEELRC 2393 (KLR); *David Njuguna Mungai v Registered Trustees of sisters of Mercy t/a Mater Hospital* [2015] KEELRC 1185 (KLR) and *Musili v Grownne Plaza Nairobi* [2023] KEELRC 1035 (KLR).

23. The 2nd respondent again argued that the petition offends the doctrine of exhaustion, a violation of section 9 of the Fair Administrative Actions Act. The 2nd respondent relied on the decisions in *William*

Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR; *Andrew Omtatah Okoiti v Attorney General & 2 others* [2011] KEHC 1370 (KLR) and *Bosire Ogero v Royal Media Services* [2015] KEHC 4728 (KLR).

24. The 2nd respondent maintained that the validity of his nomination as a member of the selection panel is *res judicata* having been determined in *Njogu v Attorney General & another* [2025] KEHC 301 (KLR).

25. The 2nd respondent cited Black's Law Dictionary, 10th Edition and the decisions in *Philomena Mbeti Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kilima (Interested Party)* [2019] KEHC 11025 to argue that there was no real, implied or

imagined conflict of interest on his membership to the selection panel.

26. The 2nd respondent maintained that having resigned, he did not hold two offices and had no personal interest as a member of the selection panel representing coalition of minority parties in Parliament. He relied on the decisions in *British American Investments Company (K) Limited v Njomaiha Investments Limited & another* [2014] KEHC 4627 (KLR); *Emmanuel Suipanu Siyanga v Republic* [2013] eKLR and *George Maina Kamau v County Assembly of Muranga & 2 others* [2019] KEELRC 1561 (KLR).

27. The 2nd respondent again relied on *Law Society of Kenya v Attorney General & 2 others* [2016] KEHC

5096 (KLR) and *Law Society of Kenya v Attorney General & another; Warsame & another (Interested parties)* [2019] KEHC 10881 (KLR) to argue that his nomination and appointment were determined and concluded without the involvement of the President thus, there is no conflict of interest.

28. The 2nd respondent argued that the Chairperson and members of IEBC being recruited by the selection panel are holders of independent officers, pursuant to article 249(2) of the Constitution as read with section 26 of the IEBC Act who act independently. Reliance was placed on the decision in *The matter of the Interim Independent Electoral Commission* [2011] eKLR.

3rd respondent's case

29. The Attorney General, the 3rd respondent, opposed the petition through grounds of opposition, contending that the petition does not meet the threshold of a constitutional petition in *Anarita Karimi Njeru v Republic* [1979] eKLR. The 3rd respondent asserted that under Paragraph 1(2) (a) of the First Schedule to the IEBC Act, the 2nd respondent was nominated by the PSC and not by the President and therefore the nomination was not by the Executive.

30. The 3rd respondent contended that the petitioner had not adduced evidence to show that the 2nd respondent did not meet the requirements in Paragraph 2A of the First Schedule to the IEBC Act. Furthermore, the 2nd respondent together with the 1st to 8th interested took oath of office as required by

the Third Schedule to the IEBC Act to uphold the Constitution and other the laws of the Republic to discharge their duties without fear or favour. According to the 3rd respondent, the position members of the selection panel were appointed to is temporary and the orders sought would have far reaching and undesirable consequences.

31. The 3rd respondent relied on the decision in *Belvin Wanjiru Namu v National Police Service Commission & Another* (supra) and submitted that the 2nd respondent's resignation had taken away the substratum of the petition. Reliance was again placed on *Adrian Kamotho Njenga v Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 others; Independent Electoral and*

Boundaries Commission (supra). The 3rd respondent urged the court to dismiss the petition.

Interested parties' case

32. The interested parties also opposed the petition and filed grounds of opposition. They asserted that the petition is moot and raises no justiciable controversy since the alleged conflict of interest ceased upon the 2nd respondent's resignation prior to his appointment as a member of the selection panel.

33. The interested parties contended that the petition is based on factual inaccuracies and unsubstantiated allegations, particularly regarding the 2nd respondent's alleged holding of two positions. The interested parties argued that the 2nd respondent

met the requirements for appointment to the selection panel in the First Schedule to the IEBC Act. Furthermore, members of the selection panel had already been appointed and taken the oath of office to uphold the Constitution and discharge their mandate with impartiality.

34. The interested parties argued that the petition did not disclose violation of articles 73, 75 and 250 of the Constitution concerning the 2nd respondent's previous service in the executive. The interested parties took the view, that the petition does not meet the threshold for constitutional litigation; undermines the IEBC's constitutional mandate and is against public interest.

35. The interested parties argued that the 2nd respondent's resignation was valid having been duly

communicated, accepted and became effective upon receipt on 24th January 2025. According to the interested parties, the resignation did not have to take a specific format where the intention to vacate office was manifest and the term “stepping aside” did not imply that the 2nd respondent remained in office. They relied on the decisions in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR; *AVGM v JMK* [2022] KEHC 9914 (KLR) and *Faustina Njeru Njoka v Kimunye Tea Factory Limited* [2022] eKLR.

36. The interested parties again cited the decision in *African National Congress v Municipal Manager, George Local Municipality & Ors* (2010) 3 BLLR 221 (SCA) to argue that resignation was a unilateral act requiring no formal acceptance. They urged the court to dismiss the petition with costs.

Determination

37. I have considered the pleadings and arguments by parties as well as the decisions relied on. The core issue for determination in this petition, is whether the 2nd respondent's appointment to the Selection Panel violated the Constitution and or the law.

38. The petitioner's argument, as I understand it, is that the 2nd respondent held two assignments namely; advisory role as a Presidential strategy and communication advisor in the Office of the President and the appointment as a member of the selection panel. According to the petitioner, the 2nd

respondent's appointment to the selection panel violated the principle of separation of powers and defeated the representative objects in the IEBC Act.

39. The petitioner argued that the 2nd respondent was aware that holding the two positions would compromise impartiality and integrity of the selection panel thus, he was bound by the provisions of Chapter six of the Constitution. The petitioner also took the view, that the 2nd respondent could not undertake both roles faithfully, impartially and in good conscience. His appointment was therefore contrary to the principles of good governance in article 10 of the Constitution and suffered procedural infirmity and illegality.

40. The respondents maintained that the 2nd respondent had resigned; did not hold two offices and had no personal interest. Having been nominated and appointed to the selection panel to represent minority coalition of parties in Parliament pursuant to section 1(2) (a) of the First Schedule to the IEBC Act, there was neither risk of conflict of interest nor violation of any constitutional or statutory provision.

41. I have considered respective parties' argument and perused the record. There is no denial that the 2nd respondent was appointed as one of the presidential advisors, a fact that was also admitted by both sides. The argument is whether the 2nd respondent held two positions and was therefore

disqualified from being a member of the select panel.

42. The record shows that the 2nd respondent sent a letter to the appointing authority on 24th January 2025 communicating his desire to step aside from his advisory position. The petitioner did not dispute this fact. During the hearing, the only issue the petitioner raised was that there was no evidence that the appointing authority accepted the 2nd respondent's request. The interested parties who were appointed together with the 2nd respondent supported the 2nd respondent's assertion that he had resigned from the advisory position prior to the appointment on 27th January 2025.

43. As already stated, the fact that the 2nd respondent had resigned or stepped aside (whatever the meaning) was not in dispute. The 2nd respondent's resignation or stepping aside is a fact that was demonstrated through a copy of the letter he attached to that effect. The 2nd respondent having submitted his letter of resignation concluded his desire to do so. The position the 2nd respondent held being a public office did not require approval or acceptance by anyone, including the appointing authority.

44. Once a person expresses the desire to leave public office, he/she cannot be forced to stay in the position. In *Okiya Omtatah Okoiti v Consolata Nkatha Maina & 3 others* (Petition No. 160 of 2018) [2018] eKLR, IEBC Commissioners had announced

that they had resigned from office as Commissioners. Later on, they changed their mind and tried to come back to office arguing that their positions had not been declared vacant which led to the filing of that petition. This court held that a commissioner just like any other person, had a constitutional right to leave the commission if he wished and no one could stop him. To leave employment was a right over which to make a choice and therefore a constitutional right that could not be limited as it was not legally possible to force one to keep a job he or she did not wish to.

45. Applying that principle to this petition, the 2nd respondent had a right to make the decision to resign and having done so, he did not need approval from the appointing authority. The petitioner did not

cite any law that required the appointing authority to accept or decline a request to leave public office once the person expresses that desire by sending the request to the appointing authority in writing.

46. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court emphasised the importance of demonstrating a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement, which plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

47. The Supreme Court said was simply that a party claiming violation of rights and fundamental freedoms (or the Constitution) should plead with precision, the constitutional rights violated, the provisions infringed and demonstrate the manner of violation so that there is a link between the alleged violation, the rights infringed and the constitutional provisions violated in order to put the other side on notice over the petitioner's claim so as to respond appropriately.

48. In this petition, apart for alleging that the 2nd respondent's appointment violated the Constitution and the law, the petitioner did not demonstrate that indeed, this was the case. The petition was based on a misapprehension rather than a real violation or threat to violate either the Constitution or the law.

49. The 2nd respondent having resigned, the petitioner did not point out any other reason that would have prevented him from being appointed to the selection panel. Furthermore, the 2nd respondent was appointed and subscribed to an oath to discharge his duties without fear or favour thus, was bound by that oath.

50. In the circumstances, the petitioner failed to demonstrate violation of either the Constitution and or the law, thereby making the petition a candidate for dismissal. Consequently, the petition is declined and dismissed. Costs being discretionary and this being a public interest litigation, each party shall bear their own costs.

**Dated and delivered at Nairobi this 3rd Day of
October 2025**

**E C MWITA
JUDGE**

ORIGINAL